

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

THE STATE OF OHIO)	CASE NO. 01 CR 000392
)	
Plaintiff)	JUDGE EUGENE A. LUCCI
)	
vs.)	<u>ORDER DENYING MOTION FOR</u>
)	<u>PUBLIC PAYMENT OF AUDIOTAPE</u>
JASON W. FRESHWATER)	<u>ANALYSIS EXPERT</u>
)	
Defendant)	

This matter came on for consideration of defendant's motion, filed November 7, 2002, for appointment and payment of an expert to analyze the audiotapes which the state may use as evidence in this case.

The issue presented by defendant's motion is whether the Court should order the state to pay for an expert witness to examine a tape recording to determine whether the tape has been tampered with, based solely on the statement of defense counsel that the expert is necessary to the defense.

The decision to grant such a motion is within the sound discretion of the court. However, in the absence of more than defense counsel's bare assertion that the services of the expert are necessary for adequate case preparation, it is probably reversible error for the Court to grant the motion – "probably" because no case in Ohio has held that a trial court's granting of such a motion was an abuse of its discretion. All of the precedent on this issue involves judicial review of a trial court's *denial* of the motion.¹

¹The Court has reviewed a number of cases on the subject, including: *State v. Sanders* (2001), 92 Ohio St. 3d 245, 750 N.E.2d 90; *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 473 N.E.2d 264; *State v. Thompson* (1987), 33 Ohio St. 3d 1, 514 N.E.2d 407; *Ake v. Oklahoma* (1985), 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53; *State v. Henderson* (1988), 39 Ohio St. 3d 24, 528 N.E.2d 1237; *State v. Esparza* (1988) 39 Ohio St. 3d 8, 529 N.E.2d 192; *State v. Landrum* (1990), 53 Ohio St. 3d 107, 559 N.E.2d 710; *State v. Sowell* (1991), 73 Ohio App. 3d 672, 598 N.E.2d 136; *State v. Gumm* (1995), 73 Ohio St. 3d 413, 653 N.E.2d 253; *State v. Broom* (1988), 40 Ohio St. 3d 277, 533 N.E.2d 682; *State v. Allen* (1995), 73 Ohio St. 3d 626, 653 N.E.2d 675; *State v. Williams* (1995), 73 Ohio St. 3d 153, 652 N.E.2d 721; *State v. Mason* (1998), 82 Ohio St. 3d 144, 694 N.E.2d 932; *State v. Jalowiec* (2001), 91 Ohio St. 3d 220, 744

Of particular interest, is the analysis presented in the recent Ohio Supreme Court case of *State v. Sanders* (2001), 92 Ohio St. 3d 245, 750 N.E.2d 90, in which the court upheld a trial court's denial of an indigent criminal defendant's request for an expert to analyze an audiotape.

In a case involving a similar request for audio expert analysis, and having received copies of the tapes in discovery, the defendant sent one to a forensic scientist, who set forth his findings in a document entitled 'Preliminary Lab Report.' The expert found 'anomalies' in the tape: discontinuities in ongoing speech, abrupt ends to conversations, and changes in background noise. In his opinion, these anomalies suggested that someone might have edited the original recording, but to determine whether editing had occurred, the expert needed to examine the original. The defendant filed a motion for expert assistance, with the expert's report attached, asking the court to appoint an expert in tape-recording analysis. The trial court denied the motion.

At trial, an FBI agent testified that the persons monitoring the recorders would have turned them off when the conversation stopped, listened periodically for further conversation, and turned the recorders back on when they heard conversation. The agent had helped to set up the equipment but did not observe the monitoring. The court of appeals held that expert assistance was unnecessary because the discontinuities in the conversation were explained by the fact that the recorders were turned on and off. However, the expert's report identified three instances where, in his opinion, a discontinuity was apparently *not* accompanied by a starting or stopping of the recorder. The court said, "Nevertheless, we find no error in the trial court's denial of the motion. Although the (expert's) report did show a possibility that the tape was edited, Sanders did not show how the alleged edits could have affected his case. His motion did not explain how the allegedly edited version of Tunnel Tape 61 differed from the actual conversation or how it would tend to falsely implicate him in the offenses charged. Hence, he did not make a "particularized showing" that the requested expert could help his defense. *Mason*, 82 Ohio St. 3d 144, 694 N.E.2d 932, syllabus." *State v. Sanders, supra*.

N.E.2d 163; *State v. Tibbets* (2001), 92 Ohio St. 3d 146, 749 N.E.2d 226; *State v. Scott* (Cuyahoga 1987), 41 Ohio App. 3d 313, 535 N.E.2d 379; *State v. Weeks* (Clermont 1989), 64 Ohio App. 3d 595, 582 N.E.2d 614; *State v. McFarland*, No. CA-92-7 (5th Dist. Ct. App., Muskingum, 1-15-1993), 1993 WL 35329; and *State v. Blankenship* (Butler 1995), 102 Ohio App. 3d 534, 657 N.E.2d 559.

The factors that this court considered are (1) the value of the expert assistance to the defendant's proper representation at the trial of this fourth degree felony drug case, and (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought. Defendant did not demonstrate to this court that the substance of the conversation or sounds on the tape at the time of the offense was to be a significant factor at trial. The defendant must show not just a mere possibility, but a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial. *State v. Broom* (1988), 40 Ohio St. 3d 277, 283, 533 N.E.2d 682, 691. Moreover, the determination of necessity lies in the trial court's discretion. Ohio requires a criminal defendant to demonstrate a particularized need for assistance. *State v. Broom* (1988), 40 Ohio St. 3d 277, 283-284, 533 N.E.2d 682, 691; *State v. Henderson* (1988), 39 Ohio St. 3d 24, 31, 528 N.E.2d 1237, 1244. Absent such demonstration, the trial court does not abuse its discretion in denying court-appointed expert assistance." *State v. Williams* (1995), 73 Ohio St. 3d 153, 652 N.E.2d 721.

An indigent defendant who seeks state-funded expert assistance bears the burden of establishing a reasonable necessity for such assistance, and 'undeveloped assertions that the proposed assistance would be useful to the defense are patently inadequate.'" *State v. Sowell* (1991), 73 Ohio App. 3d 672, 681, 598 N.E.2d 136, 142, quoting *State v. Scott* (1987), 41 Ohio App. 3d 313, 315, 535 N.E.2d 379, 382. Defense counsel's bare assertion that expert services, such as psychiatric services, are necessary for adequate case preparation, standing alone, does not meet the test of *Ake, supra*, or *Jenkins, supra*. *State v. Henderson* (1988), 39 Ohio St. 3d 24, 528 N.E.2d 1237.

Accordingly, defendant's motion for an order appointing an expert and requiring the state to pay for an analysis by the expert of the audiotapes to be used in evidence in this case is hereby denied.

IT IS SO ORDERED.

JUDGE EUGENE A. LUCCI

c: Werner G. Barthol, Esq., Assistant Prosecuting Attorney
Russell W. Tye, Esq., Attorney for defendant